Supreme Court, U.S.
FILED

No. 97-1604 MAR 30 1998

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

KNIGHTS OF THE KU KLUX KLAN and
DAVID A. NEUMANN,
Petitioners,

v.

MAYOR OF LANSING and CITY OF LANSING,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTION PRESENTED FOR REVIEW

Where a state actor seeks and successfully obtains a court order which has the effect of violating a person's constitutional rights, is the state actor's conduct a proximate cause of the constitutional violation for purposes of a cause of action under 42 U.S.C. § 1983, or is the sole cause of that violation the intervening court order?

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The December 30, 1997, Order of the Michigan Supreme Court denying Petitioners' request for leave to appeal is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 456 Mich. 915; __ N.W.2d __(1997). That order is reproduced in the attached Appendix beginning at page 1a.

The April 4, 1997 opinion of the Michigan Court of Appeals is reported as *Mayor of the City of Lansing v. Knights of the Ku Klux Klan (After Remand)*, 222 Mich. App. 637; 564 N.W.2d 177 (1997). That opinion is reproduced in the attached Appendix beginning at page 3a.

The June 20, 1995, opinion of the Ingham County Circuit Court is not officially reported. That opinion is reproduced in the attached Appendix beginning at page 19a.

JURISDICTION

The Michigan Court of Appeals' decision was issued on April 4, 1997. Petitioners filed an Application for Leave to Appeal in the Michigan Supreme Court seeking discretionary review. That application was denied in an Order dated December 30, 1997 (App. 1a). This Court's jurisdiction is being invoked under 28 U.S.C. §1257(a).

STATUTE INVOLVED IN THIS CASE

42 U.S.C. §1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On June 6, 1994, the Knights of the Ku Klux Klan (KKK) applied for permission to conduct a rally on the grounds of Michigan's State Capitol on July 23, 1994. The KKK filed the appropriate request with the Michigan Capitol Committee, the committee created by Michigan law which is charged with the responsibility of overseeing the capitol grounds. The request was approved by the Executive Director of the Michigan Capitol Committee in early June. Following that approval, the KKK and its Michigan coordinator, David Neumann, began making plans for the scheduled rally.

On July 8, 1994, the City of Lansing and David Hollister, the mayor of the City of Lansing, filed a cause of action in the Ingham County Circuit Court against the KKK, Mr. Neumann and several other individuals. In their Complaint, the City of Lansing and Mr. Hollister (hereinafter: "Respondents") sought an injunction "prohibiting and restraining the Defendants, their employees, agents, members and those in active concert with them from conducting, or allowing to be conducted, a Klan rally . . . on the State Capitol Grounds on July 23, 1994, or any other date . . ."

On July 18, 1994, the KKK and Mr. Neumann (hereinafter: "Petitioners") filed their Answer to the Complaint. Petitioners also filed a counterclaim in which they asserted that Respondents, by initiating and prosecuting their injunction action, were "seeking to restrain the exercise of [Petitioners'] state and federal constitutional rights to free speech, association, assembly and petition." The Petitioners' counterclaim contained a request for declaratory relief and damages under both the Michigan Constitution and the federal civil rights act, 42 U.S.C. §1983.

A hearing on the Respondents' Motion for Preliminary Injunction was held in the Ingham County Circuit Court on July 19, 1994, four days before the rally was scheduled to take place. At that hearing, Respondents presented three witnesses, Mr. Hollister and two members of the city's police force. These three witnesses testified concerning an earlier KKK rally at the state capitol conducted in April 1994. During that rally counter-demonstrators attempted to disrupt the KKK's activities. All three witnesses who testified at the preliminary injunction hearing acknowledged that the KKK participants in the April 1994 rally had been lawful and non-violent. However, three counter-demonstrators were arrested and there were three minor injuries caused by the actions of the counter-demonstrators. Respondents' witnesses also testified that they feared that there might be similar violence directed against the KKK by counter-demonstrators at the rally planned for July 23, 1994. On the basis of this fear of violence from counter-demonstrators, Respondents requested an injunction prohibiting Petitioners from conducting their rally at the state capitol.

At the end of the July 19, 1994, hearing, the circuit judge orally announced that he would grant the request for a preliminary injunction:

> The testimony in this case compels me to conclude that the city cannot adequately police or prevent crowd violence with the personnel available at the state capitol this coming Saturday. Therefore, I will grant the injunction prayed for by the city.

Two days later the circuit judge signed an injunction. That injunction specified that the Petitioners and their agents:

> [B]e and hereby are restrained and enjoined from conducting, or allowing to be conducted, or holding, or allowing to be held, a Knights of the Ku Klux Klan or Knights of the Ku Klux Klan/Michigan Realm rally or rallies on the State of Michigan Capitol Grounds in Lansing, Michigan until further Order of this Court, and that said preliminary injunction will be effective from this date.

Petitioners abided by the terms of the circuit court's preliminary injunction; they did not hold the rally which they had planned for the state capitol on July 23, 1994.

Petitioners, however, challenged the circuit court's injunctive decree in the Michigan Court of Appeals, filing an emergency appeal in that court. On August 2, 1994, a panel of that Court issued an Order summarily reversing the circuit court's preliminary injunction. (App. 26a). The Michigan Court of Appeals held that the circuit court's injunction infringed on Petitioners' "exercise of [their] First Amendment rights in a quintessentially public forum. . ." *Id.* After concluding that the circuit court's injunction violated the Petitioners' First Amendment rights, the Michigan Court of Appeals remanded the case to the circuit court for further proceedings.

Respondents did not appeal the Court of Appeals' determination that the injunction violated Petitioners' First Amendment rights to the Michigan Supreme Court.

Following remand to the circuit court, Petitioners filed a motion for partial summary judgment on the issues raised in their counterclaim. In that motion, Petitioners asserted that, because the Court of Appeals had ruled in its August 2, 1994,

decision that the injunction obtained by Respondents had violated Petitioners' First Amendment rights, they were entitled to judgment with respect to the liability aspects of their §1983 claim.

Respondents filed a response to the Petitioners' motion for partial summary judgment. In addition, Respondents filed their own motion for summary disposition, requesting that all of the claims stated in the Petitioners' counterclaim be dismissed.

Following briefing and oral argument on the motions, the circuit court issued a written Opinion and Order on June 20, 1995, granting Respondents' motion for summary judgment (App. 19a).

Petitioners appealed the circuit court's decision dismissing their §1983 and state constitutional claims to the Michigan Court of Appeals. The briefs which the parties submitted to that court were primarily addressed to law of the case principles; Petitioners argued that the circuit court's decision granting judgment as a matter of law to Respondents was in conflict with the Michigan Court of Appeals' August 2, 1994, Order which found that the injunction violated Petitioners' rights under the Untied States Constitution. During oral argument in the Michigan Court of Appeals one of the three judges assigned to the case raised the additional question of whether Respondents' conduct could be considered a proximate cause of Petitioners' injury or whether the source of that injury was solely the circuit court's issuance of an injunction.

On April 4, 1997, the Michigan Court of Appeals issued its decision in this case. *Mayor of the City of Lansing v. Knights of the Ku Klux Klan*, 222 Mich. App. 637; 564

N.W.2d 177 (1997). In that opinion, the court addressed only a single issue - whether the Respondents' actions in seeking and successfully obtaining an injunction barring Petitioners' rally constituted a proximate cause of the Petitioners' constitutional injury. In addressing this question, the Michigan Court of Appeals acknowledged that, based on its August 2, 1994 decision, there was no question that, "the harm to defendants . . . was caused by a constitutional violation." (App. 7a). Yet, despite concluding that Petitioners' constitutional rights had been violated, the Michigan Court of Appeals held that summary judgment was appropriate with respect to their §1983 claim because the Respondents' conduct did not cause the violation of Petitioners' constitutional rights.

The Michigan Court of Appeals held, instead, that the "direct 'cause' of the constitutional violation here was the court's issuance of the overbroad injunction, not plaintiff's pursuit thereof." (App. 10a). And, drawing upon a single federal precedent, *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18, International Typographical Union*, 471 F.2d 872 (6th Cir. 1972), a case which arose in the context of the Labor Management Relations Act, 29 U.S.C. §185, *et. seq.*, the Michigan Court of Appeals adopted the following "general rule" of causation in cases filed under 42 U.S.C. §1983:

> . . . under the general rule, the act of filing a complaint seeking injunctive relief does not "cause" the erroneous issuance of the requested injunction for the purpose of §1983 because any erroneous issuance of an injunction is the act of the *court*.
>
> (App. 10-11a.)

(emphasis in original.)

Because, in its view, the violation of Petitioners' First Amendment rights was "directly" caused by the circuit court's injunction, not the conduct of the Respondents, the Michigan Court of Appeals held that summary judgment was appropriate on Petitioners' §1983 claim.

Petitioners sought leave to appeal the dismissal of their §1983 claims in the Michigan Supreme Court. On January 30, 1997, the Michigan Supreme Court issued an Order denying Petitioners' application. (App. 1a).

REASONS FOR GRANTING THE WRIT

I. THE MICHIGAN COURT OF APPEALS' DETERMINATION THAT RESPONDENTS' CONDUCT WAS NOT A PROXIMATE CAUSE OF THE VIOLATION OF PETITIONERS' FIRST AMENDMENT RIGHTS IS ERRONEOUS AND IN CONFLICT WITH NUMEROUS REPORTED FEDERAL DECISIONS ON THIS SUBJECT.

This case raises an important question related to the issue of causation in §1983 litigation. The Michigan Court of Appeals held herein that Respondents, who sought and obtained a court order which had the effect of violating Petitioners' First Amendment rights, could not be held liable for their conduct under §1983 because that conduct was not a cause of Petitioners' constitutional injury. In arriving at this conclusion, the Michigan Court of Appeals has seriously misapplied federal law bearing on the essential element of causation in a §1983 claim.

In reaching its decision the Michigan Court of Appeals drew a sharp line between the conduct of the Respondents, in seeking and successfully obtaining an injunction, and the circuit court's order granting Respondents the relief which they had requested. In the view of the Michigan Court of Appeals, it was the circuit court's order which represented the "direct" cause of Petitioners' injuries, not the actions of Respondents in seeking that order.

The analysis employed by the Michigan Court of Appeals is suspect for a number of reasons. Its resolution of the causation question presented herein is in direct conflict

with the express wording of §1983 and irreconcilable with a number of decisions of this Court and the federal appellate courts.

The Michigan Court of Appeals ruled herein that Respondents did not "directly" deprive the Petitioners of their constitutional rights. In the Michigan Court of Appeals' view, the individual who subjected Petitioners to a violation of their rights was the circuit judge who issued the injunction, not the Respondents.

Yet, even if this were an accurate portrayal of what occurred in this case, this analysis fails to take into account the express wording of §1983. That statute provides for a cause of action against any person who, acting under color of law, "subjects or *causes to be subjected*" any person to a violation of federal constitutional rights. Thus, under the text of §1983, Respondents are not merely liable for their conduct which *directly* subjects an individual to a violation of constitutional rights; they are also liable for any conduct which *causes an individual to be subjected* to a violation of such rights.

§1983's causation language has been addressed in a number of federal appellate decisions. In these cases the federal courts have focused on the "subjects or causes to be subjected" phrase within §1983 and have drawn the following conclusion:

> "The requisite causal connection [between the government conduct and the deprivation] can be established not only by some kind of direct personal participation in the deprivation *but also by setting in motion a series of acts by others which the actor knows or reasonably*

> *should know would cause others to inflict the constitutional injury.*"
>
> *Waddell v. Forney,* 108 F.3d 889, 894 (8th Cir. 1997). (emphasis added).

The conclusions reached by the Eighth Circuit in *Waddell* have been repeated in other federal circuits. See *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988); *Merritt v. Mackey*, 827 F.2d 1368, 1371 (9th Cir. 1987); *Springer v. Seamen*, 821 F.2d 871, 879 (1st Cir. 1987).

As these decisions indicate, the text of §1983 anticipates that claims may be made not only against those state actors whose conduct "directly" infringes on federally protected rights, but also against those who "set[] in motion a series of acts by others", which the state actor knows or reasonably should have known would result in injury.

That is precisely what occurred in this case. By seeking and successfully obtaining an injunction Respondents caused Petitioners to be subjected to a violation of First Amendment rights. That is sufficient for liability under §1983.

The Michigan Court of Appeals' analysis in this case is not only in conflict with the text of §1983, it is also contrary to a wealth of federal court precedent which has construed the causation question in litigation under the civil rights statute.

This Court had occasion to consider the causation element in a §1983 action in *Malley v. Briggs*, 475 U.S. 335 (1986). In *Malley*, a police officer applied for an arrest warrant by asserting that Mr. Briggs was guilty of drug

possession. This warrant was later signed by a judge and formed the basis for Mr. Briggs' arrest. The criminal charges lodged against Mr. Briggs were subsequently dismissed, and he instituted a cause of action under §1983 against the police officer who applied for the warrant, asserting that the arrest violated his Fourth Amendment rights.

One of the defenses offered by the defendant in *Malley* was based on proximate cause. The defendant argued that the judge's signing of the arrest warrant operated to break the causal relationship between his own conduct and the deprivation of Mr. Briggs' constitutional rights.

In *Malley*, this Court considered the scope of the immunity which the defendant possessed under these circumstances. However, in the course of its opinion the Court also addressed the defendant's causation argument and emphatically rejected it:

> Petitioner has not pressed the argument that in a case like this the officer should not be liable because the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest. It should be clear, however, that the district Court's "no causation" rationale in this case is inconsistent with our interpretation of §1983. As we stated in *Monroe v. Pape*, 375 U.S. 167, 187 (1961), §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Since the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read §1983 as recognizing

the same causal link.

> *Malley*, 475 U.S. at 344, n. 7
> (emphasis added).

As noted in *Malley*, this Court confirmed in *Monroe v Pape, supra*, that a §1983 claim must be read in conjunction with the general tort principle that "makes a man responsible for the natural consequences of his actions." In this case, Respondents requested an injunction to prohibit Petitioners from conducting a rally at the state capitol. Ultimately, Respondents were awarded the injunction which they sought. Where, as here, a party files a case in which it seeks a particular injunctive decree and an injunction is ultimately issued in precisely the form requested, that injunction is the "natural consequence" of the actions of the party which sought its issuance. Thus, under *Monroe v. Pape* and *Malley*, the Michigan Court of Appeals erred in concluding that Respondents' conduct was not a proximate cause of Petitioners' injury.

Like the police officer in *Malley*, Respondents herein requested that a judicial officer enter an order which had the effect of violating a party's constitutional rights. Respondents, like the police officer in *Malley*, cannot immunize themselves from liability for initiating this process by suggesting that a subsequent judicial order, which they requested, severs the causal chain.

The *Malley* holding was more recently reaffirmed in *Wyatt v. Cole,* 504 U.S. 158 (1992), where the Court, citing *Malley*, indicated that a §1983 cause of action would "extend to complaining witnesses who . . . set the wheels of government in motion by instigating a legal action." 504 U.S. 164-165. Again, that is precisely what Respondents

have done in the instant case. They instituted a court case which was designed to prevent the Petitioners from exercising their First Amendment right to conduct a rally at the state capitol. The fact that Respondents succeeded in obtaining the court order which they sought and a judge issued an injunction does not mean that the causal relationship between their conduct and the Petitioners' injuries was somehow broken.

Following the lead of *Malley*, federal courts have routinely rejected the argument that a §1983 claim fails on proximate cause grounds because intervening judicial conduct severs the causal link between a state actor's conduct and the violation of an individual's constitutional rights. See, e.g., *Jones v. City of Chicago*, 856 F.2d 985, 993-994 (7th Cir 1988); *Robinson v. Maruffi*, 895 F.2d 649, 656 (10th Cir. 1990); *Buenrostro v. Collazo*, 973 F.2d 39, 45 (1st Cir. 1992); *DeLoach v. Beavers*, 922 F.2d 618, 621-622 (10th Cir. 1990); *Goodwin v. Metts*, 885 F.2d 157, 161-162 (4th Cir. 1989); *Wagenmann v. Adams,* 829 F.2d 196, 212-213 (1st Cir. 1987); *Reich v. Minnicus*, 886 F. Supp. 674, 684-685 (S.D. Ind. 1993); *Johnson v. City of Chicago*, 711 F. Supp. 1465, 1473-1474 (N.D. Ill. 1989); *Mitchell v. City of Hartford*, 674 F. Supp. 60, 64-65, (D. Conn. 1986).

The holdings reached by the courts in these cases are not particularly surprising in light of the fact that it is universally recognized that common law tort principles are applicable to §1983 cases. See *Malley*, 475 U.S. at 344, n. 7; *Monroe v. Pape, supra* (1961); *cf. Carey v. Piphus*, 435 U.S. 247, 257-258 (1978); 42 U.S.C. §1988. And under fundamental common law tort principles, Respondents cannot sustain a claim that the circuit court's decision granting an injunction constitutes *the* cause or a superseding cause of the Respondents' injuries, thereby severing the causal

relationship.

The common law of torts recognizes, for example, that these may be more than one proximate cause of a particular injury. Restatement (Second) of Torts, §430 and Comment d. Thus, a party whose conduct represents a factor in bringing about an injury "will not be absolved from libility merely because other causes have contributed to the result . . ." W. Keeton, Prosser and Keeton on the Law of Torts, p. 268 (5th ed. 1984).

It is also a basic notion of the common law of torts that an intervening force will constitute a superseding cause, thereby breaking the causal chain between the torfeasor's conduct and the plaintiff's injury, only where that intervening force is not reasonably foreseeable. Keeton, *supra*, §44, pp. 303-306. cf. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996). Thus, the conduct of a third person will not be deemed a superseding cause under common law principles if that conduct was foreseeable at the time of the original tortious acts. Moreover, under basic common law principles, intervening conduct which is negligent or even intentional in character may be reasonably foreseeable. *See* Keeton, *supra*, pp. 304-305; Restatement (Second) of Torts, §§447-448.

Under these basic common law principles, the Michigan Court of Appeals' determination that the actions of Respondents were not a proximate cause of Petitioners' constitutional injuries cannot be sustained.

It is, of course, true that once Petitioners secured the appropriate permit to conduct their rally at the state capitol, Respondents could not by themselves stop that rally from taking place; they needed a court order to prevent it. In that obvious sense another force was necessary to prevent

Petitioners from exercising their First Amendment rights. It is, however, equally obvious that the circuit court could not have taken the steps to prevent Petitioners' rally on its own. To issue the injunction the circuit court had to be presented with a case over which it could exercise jurisdiction.

This case, therefore, presents a situation which is routinely found in the common law of torts - two forces must, of necessity, coalesce to bring about a particular injurious result. However, under basic common law principles in these circumstances both of these forces will be considered a proximate cause of any injury that results. Thus, based on fundamental common law principles, Respondents could not escape liability simply because their conduct was not the "direct" cause of the injury.

Similarly, under basic common law principles Respondents could not assert that the circuit court's order represented a superseding cause of Petitioners' injuries. It is impossible to suggest that the issuance of the circuit court's injunction was not foreseeable from Respondents' perspective when that order was specifically requested by the Respondents.

The Michigan Court of Appeal's resolution of the causation element of Petitioners' §1983 claim was erroneous for all of the reasons stated above. Based on either the express language of §1983, this Court's decision in *Malley* or fundamental common law principles which are incorporated into §1983, Respondents' successful effort to obtain an injunction which violated Petitioners' First Amendment rights constituted a proximate cause of the injuries which resulted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 25, 1998